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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 662

WILLIAM (BILL) FLIPPIN, JACK BAUGH, AND TUDE PURKEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 157–166) is reported in 121 F. (2d) 742.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 16, 1941 (R. 166). A petition for rehearing was denied on August 28, 1941 (R. 179). The petition for a writ of certiorari was filed September 27, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals could appropriately determine in this case that the Oklahoma liquor legislation, insofar as it defined as intoxicating and prohibited the sale of liquor containing more than 3.2% of alcohol by weight, is in conformity with the Federal Liquor Enforcement Act of 1936.

2. Whether the Oklahoma legislation makes provision for a permit to accompany all intoxicating liquor which may be lawfully imported into the State.

3. Whether the trial court properly rejected certain of petitioners' proferred instructions.

4. Whether it was proper to allow interrogation of a Government witness concerning his testimony before the grand jury to refresh his recollection.

STATUTES INVOLVED

The Liquor Enforcement Act of 1936 (Act of June 25, 1936, c. 815, sec. 3, 49 Stat. 1928; 27 U. S. C. Supp. V, sec. 223), and the pertinent provisions of the laws of Oklahoma relating to the sale and importation of intoxicating liquor are set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

Petitioners were convicted (R. 16–18) in the United States District Court for the Western District of Arkansas upon the first count of a seven-count indictment (R. 5–8). This count charged them with having conspired with two others, who were not indicted, to import intoxicating liquor from the State of Arkansas into the State of Oklahoma, in violation of the Liquor Enforcement Act of 1936. Various overt acts were alleged, including the substantive offenses charged in the remaining six counts of the indictment.[1]

Petitioner Flippin was sentenced to imprisonment for two years and to pay a fine of $2,500 (R. 23–24); petitioner Baugh to imprisonment for eighteen months and to pay a fine of $1,000 (R. 24–25); and petitioner Purkey to imprisonment for one year and one day and to pay a fine of $1,000 (R. 25–26).

ARGUMENT

1. In *Dolloff* v. *United States*, 121.F. (2d) 157, the court below held that the Kansas liquor legislation defining as intoxicating and prohibiting the sale of liquor containing more than 3.2% of alcohol by weight was in conformity with the 4% of alcohol by volume standard prescribed in the Federal

[1] While these counts were excluded from the transcript in accordance with petitioners' praecipe (R. 8), their substance appears in the trial court's charge to the jury (R. 119–120).

Liquor Enforcement Act of 1936. It rested its conclusion not only upon the evidence in the record before it but upon scientific authorities and standard encyclopedias, which it found corroborated this evidence, and also upon the legislative history of the federal statute, as reflected in a congressional committee report, which indicated that Congress, in enacting the legislation, considered that the two measurements were equivalents, if not identical. This Court denied a petition for writ of certiorari in the *Dolloff* case on October 13 (No. 501, present Term).

In the instant case the court below adopted its conclusion in the *Dolloff* case as to the substantial identity of the two measurements in holding that the Liquor Enforcement Act of 1936 is applicable to the State of Oklahoma. Petitioners concede that the Oklahoma and the Kansas liquor legislation in their definition of intoxicating liquor and their prohibition of its sale are alike (Pet. 26), but argue (Pet. 21–35) that the court could not reach its conclusion in the instant case as to the identity of the standards in the state and federal legislation because in this case, unlike the *Dolloff* case, the record contained no proof on the subject. They therefore assert that the present case is in no different situation than were the cases of *Arnold* v. *United States,* 115 F. (2d) 523, and *Gregg* v. *United States,* 116 F. (2d) 609, in which the court below held that in the absence of proof it could not translate the term used in the federal statute (4% by

volume) into the term used in the Kansas legislation (3.2% by weight).

However, in the *Arnold* case the court said (p. 525): "We are cited to no recognized standards, tables or formulae, by aid of which such translation of terms may be effected." There is, moreover, nothing in that decision to indicate that the court's attention was directed to the legislative history of the federal statute. Without any basis for determining the relationship between the two measurements, the court, of course, properly refused to assume they were equivalents. The decision in the *Gregg* case was based upon the *Arnold* decision.

But in the instant case the court had the benefit of the scientific authorities, standard encyclopedias, and legislative history of the federal act which had been called to its attention in the *Dolloff* case. It would seem too clear for argument that the court was not required to blind itself to these sources of information, not dependent upon evidence, to which its attention had previously been called. Undoubtedly the court's decisions in the *Arnold* and *Gregg* cases would have been different if it had then had the benefit of this information, since, as was said by Mr. Justice Holmes in *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 64, "there are many things that courts would notice if brought before them that beforehand they do not know." Moreover, in the *Dolloff* case there was an attempt, by evidence, in support of a plea in

bar by the defendant, to question the identity of the two measurements, an attempt met by the Government's evidence and resolved in its favor. No such effort was made by the petitioners in the present case, and they do not question that the court's conclusion as to the equivalence of the two measurements is sustained by the informational sources upon which it relied. Under the circumstances there was, we submit, no necessity for the production of proof by the Government as to the relationship of the two measurements.

Edwards v. *United States,* decided by this Court on March 3, 1941 (No. 377, last Term), is obviously not in point. That case would be significant only if the petitioners here had been refused an opportunity to prove disparity between the two standards.

2. Petitioners contend that Oklahoma has not adopted either one of the two alternative control methods required by the federal statute, i. e. (1) the prohibition of all importation of intoxicating liquor, as defined by it, or (2) the setting up of a permit system in connection with "intoxicating liquor" which may be lawfully imported (Pet. 36–46). Concededly the state has not adopted the first control method but, without pursuing all of the ramifications of petitioners' argument, it is manifest (*infra,* pp. 12–13) that the state provides for and requires a permit to accompany importations of the only intoxicating liquor (industrial and medicinal alcohol and wine for sacramental purposes) which may be lawfully brought into the

state. *De Hasque* v. *A., T. & S. F. Ry. Co.,* 68 Okla. 183 (1918), relied upon by petitioners as indicating that sacramental wine cannot be considered as "intoxicating liquor," is not in point. In that case the court was obliged to exclude sacramental wine, even though intoxicating, from the purview of an earlier Oklahoma liquor statute, in order to avoid constitutional difficulties. The present legislation presents no such problem since it allows such wine to be imported under a permit. While the Circuit Court of Appeals for the Tenth Circuit in *Dunn* v. *United States,* 98 F. (2d) 119, held that the then (1938) Oklahoma legislation did not comply with the control requirements of the federal statute, the same court held in *Hayes* v. *United States,* 112 F. (2d) 417, that Oklahoma had met the requirements of the federal act by its new (1939) permit legislation. See also *Epps* v. *United States,* 112 F. (2d) 931 (C. C. A. 10); *Hastings* v. *United States,* 115 F. (2d) 216 (C. C. A. 8); *Hinkle* v. *United States,* 115 F. (2d) 217 (C. C. A. 8).[2]

3. Contrary to petitioners' contention (Pet. 46–50), their Special Requested Instructions Nos. 2–6, inclusive, were, we submit, properly rejected.

(a) Petitioners assert (Pet. 48–50) that if the proof showed a conspiracy, it established one

[2] Petitioners' contentions that the indictment was demurrable (Pet. 36) and that the court improperly charged the jury that the state law conformed to the requirements of the federal statute (Pet. 54–56) are sufficiently answered by the above discussion.

which was formed and in existence not in Arkansas, in which the case was tried, but in Oklahoma, and therefore that the court should have given their Requested Instruction No. 2 (Pet. 46–47).

Obviously this instruction was incorrect insofar as it required the jury to predicate petitioner Flippin's guilt upon the commission by him of an overt act within the jurisdiction of the trial court. The commission of such an act within the trial court's jurisdiction by any one of petitioner Flippin's coconspirators was of course sufficient. *United States* v. *Rabinowich,* 238 U. S. 78; *Hyde* v. *United States,* 225 U. S. 347; *Palmero* v. *United States,* 112 F. (2d) 922 (C. C. A. 1); *Brock* v. *Hudspeth,* 111 F. (2d) 447 (C. C. A. 10); *Baker* v. *United States,* 21 F. (2d) 903 (C. C. A. 4), certiorari denied, 276 U. S. 621.

While it is true that the trial court did not specifically charge the jury that it must find the commission of an overt act within the court's jurisdiction, it was justified in failing to give such an instruction since there was abundant *undisputed* testimony establishing various overt acts relating to the purchase of liquor by one or more of the conspirators in that portion of Arkansas within the court's jurisdiction (R. 32–35, 37, 38, 41, 43, 47, 70, 75–77, 79, 81, 83, 85–89, 90, 91, 93, 96, 99, 100, 109, 113). Moreover, the trial court charged the jury that the indictment alleged that the conspiracy was entered into within its juris-

diction (R. 116) and that the jury could not convict unless it found beyond a reasonable doubt that the defendants were guilty of the conspiracy *as alleged in the indictment* (R. 119). There is clearly no basis for the petitioners' view that the allegation in the indictment as to the existence of the conspiracy in Arkansas was unsupported by evidence. There was considerable proof establishing a concert of action, pursuant to a continuing conspiracy, between at least three of the conspirators in that part of Arkansas within the trial court's jurisdiction (R. 64, 68, 70, 75–77, 79, 81, 83, 85–89, 90, 91, 93, 96, 99, 100, 109, 113).

(b) Requested Instruction No. 3 (Pet. 47) was obviously incorrect since it would have prevented a conviction, even though the conspiracy was in existence in Arkansas, unless there was, in addition, an overt act committed in that jurisdiction. *Hyde* v. *United States, supra.*

(c) Requested Instructions Nos. 4, 5 and 6 (Pet. 47–48) were properly refused since they were covered in substance by instructions given by the court (R. 118–119, 126–128).

4. Prejudicial error is alleged to have been committed when the trial court permitted the Government to interrogate one of its witnesses, Gilbert, as to his testimony before the grand jury (Pet. 51–54). The record indicates, however, that the purpose of this interrogation was to refresh the recollection of the witness and that the court was careful so to limit it (R. 99, 104–105). This Court

has held that the "use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge [citing authorities]. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection." *Socony-Vacuum Oil Co.* v. *United States,* 310 U. S. 150, 233. There appears to have been no abuse of discretion, and hence no prejudicial error was committed. See *Metzler* v. *United States,* 64 F. (2d) 203, 205 (C. C. A. 9); *Di Carlo* v. *United States,* 6 F. (2d) 364, 368 (C. C. A. 2), certiorari denied 268 U. S. 706; 8 *Wigmore,* Evidence (3d ed., 1940) sec. 2362.

CONCLUSION

The case was correctly decided below, presents no important question of federal law, and involves no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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OCTOBER, 1941.